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No. 56625-3-I

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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

RAJVIR PANAG, on behalf of herself and all others similarly situated,

Respondent/Cross-Appellant,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON, a domestic insurance company, and CREDIT CONTROL SERVICES, INC. d/b/a Credit Collection Services,

Appellants/Cross Respondents.

FARMERS INSURANCE COMPANY'S REPLY AND OPPOSITION TO RESPONDENT'S OPENING BRIEF

Stevan D. Phillips, WSBA #2257
Rita V. Latsinova, WSBA #24447
Deirdre L. Runnette, WSBA #28888
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 624-0900
Attorneys for Appellant/Cross Respondent Farmers Insurance Company of Washington

TABLE OF CONENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

I. INTRODUCTION

The trial court properly held, as a matter of law, that Ms. Panag failed to establish injury, one of the necessary elements of a Consumer Protection Act ("CPA") claim. The trial court did not have to reach this issue, however. The conduct of which Ms. Panag complains – Farmers' effort to collect its subrogation interest which has not been reduced to judgment – is permitted under state and federal law. Accordingly, it was error for the trial court to fail to dismiss Ms. Panag's CPA claim on Farmers' CR 12(b)(6) motion.[1]

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[1] Ms. Panag claims that Farmers did not properly appeal this trial court error. Panag's Opening Brief at 2 n.1. This is incorrect. "RAP 2.4(b) expressly permits the appellate court to review any earlier order or ruling, including an appealable order, regardless of whether it is designated in the notice of appeal if it prejudicially affects the decision designated in the notice." *Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 505, 798 P.2d 808 (1990) (internal quotation omitted). Here, the summary judgment order from which Farmers appeals would not have been entered if the trial court had dismissed this action earlier. "In other words, if the trial court had granted the motion [to dismiss], the case would have ended." *Right-Price Recreations, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 379, 46 P.3d 789 (2002) (reviewing order on motion to dismiss not designated in notice for discretionary review); *see also Behavioral Sciences Inst. v. Great-West Life*, 84 Wn. App. 863, 870, 930 P.2d 933 (1997) ("An appeal from a final judgment brings up most pretrial orders.") (citation omitted).

The trial court further erred when, after dismissing Ms. Panag's CPA claim as a matter of law, it stayed entry of judgment and ordered Farmers and CCS to provide information to help Ms. Panag's counsel locate a replacement plaintiff. By granting Farmers and CCS summary judgment on Ms. Panag's sole claim, the trial court resolved all issues between the parties and was divested of continuing jurisdiction.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR ON CROSS REVIEW

Whether the court properly ruled, as a matter of law, that Ms. Panag failed to demonstrate the elements necessary to establish a CPA claim?

III. STANDARD OF REVIEW

The Court of Appeals "reviews the facts and law with respect to summary judgment *de novo*." *Viking Props. Inc. v. Holm*, 155 Wn.2d 112, 119, 118 P.3d 322 (2005) (internal citations and quotations omitted). Whether a particular action gives rise to a CPA violation is reviewable as a question of law. *See Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997) (citations omitted).

Ms. Panag erroneously characterizes Farmers' appeal of the summary judgment order as a discovery dispute. Panag's Opening Brief at 12. Farmers' challenge is to the trial court's jurisdiction after final resolution of all claims of the parties. Whether a court may exercise jurisdiction is a question of law subject to *de novo* review. *See Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005).

IV. ARGUMENT

A. Farmers' Subrogation Claim Was Not "Unfair" or "Deceptive" as a Matter of Law.

While the trial court properly determined that Ms. Panag suffered no injury to her business or property and therefore could not satisfy one of the necessary elements of her CPA claim, it erred by denying Farmers' initial motion to dismiss Ms. Panag's action.[2] CP 157-71, 232-37, 238-39. By failing to recognize that Farmers' effort

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[2] Granting Farmers' CR 12(b)(6) motion in part, and denying it in part, the trial court dismissed any "per se violation under the FDCPA or the CPA" and Ms. Panag's claim for unjust enrichment. CP 238-39.

to collect an unliquidated subrogation[3] claim not yet reduced to judgment was neither deceptive nor unfair as a matter of law, the trial court improperly created a private cause of action under the CPA for conduct otherwise permitted under state and federal law.

1. Efforts to Collect Alleged "Amounts Due" Are Neither Unfair Nor Deceptive as a Matter of Law.

Contrary to Ms. Panag's assertion, the Fair Debt Collection Practices Act ("FDCPA") is relevant to her claim. The Washington Legislature explicitly recognized that in enacting the CPA it was informed by the federal statutes and cases which define unfair or deceptive practices:

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[3] Subrogation "principles developed to prevent the unjust enrichment of... the tortfeasor whose debt is paid by the insurer.... Generally, subrogation allows the insurer to be substituted to the rights of the insured and pursue recovery directly from the tortfeasor...." *Paulsen v. Dep't of Social & Health Servs.*, 78 Wn. App. 665, 668, 898 P.2d 353 (1995), *review denied*, 128 Wn.2d 1010, 910 P.2d 481 (1996). Washington courts recognize subrogation as an equitable right. *Meas v. State Farm Fire & Cas. Co.*, 130 Wn. App. 519, 522, 123 P.3d 519 (2005) ("Subrogation is an equitable doctrine, the purpose of which is to provide for proper allocation of payment responsibility.... It seeks to impose ultimate responsibility for a wrong or loss on the party who, in equity and good conscience, should bear it.") (internal citations omitted).

> The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that in construing this act, the courts be guided by final decisions of the federal courts.

RCW 19.86.920.

The FDCPA provides precedent for what constitutes "deceptive" and "unfair" collection practices. *See* U.S.C. § 1692e(2)(A) (the FDCPA forbids any "false, deceptive or misleading representation or means used in the attempt to collect a debt" and "the false representation of . . . the character, amount, or legal status of any debt"). Because Ms. Panag had no cause of action under the FDCPA,[4] she sought to create one under the CPA

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[4] Farmers' subrogation claim against Ms. Panag arises out of a tort, not a consumer transaction, and thus is not a "debt" within the reach of the FDCPA. *See* 15 U.S.C. § 1692(a)(5); CP 214-15.

> When a negligent driver causes an auto accident which gives rise to an insurer's subrogation claim, the alleged obligation does not arise out of a consumer transaction; it arises from a tort. In conducting herself in a negligent manner that precipitated the accident, [the driver] engaged in no consumer transaction. She neither purchased nor used goods or services. Rather [the driver] finds herself indebted to [the

by claiming that CCS's request on Farmers' behalf of an "amount due" on an "unliquidated, unadjudicated potential tort claim" was unfair or deceptive. This effort must fail because federal and state laws regulating collection actions permit the very conduct of which Ms. Panag complains. *See* 15 U.S.C. § 1692(a)(5) (defining the term "debt" as an "obligation" or an "alleged obligation"); RCW 19.16.100(2)(a) (collection agency includes persons attempting to collect claims asserted to be owed). Indeed, federal courts do not find efforts to collect alleged amounts due to be unfair or deceptive. *See, e.g., Wade v. Reg'l Credit Ass'n,* 87 F.3d 1098, 1099 (9th Cir. 1996) (notice stating that the creditor's records showed "this amount owing" did not constitute false, deceptive, or misleading means of collecting debts under the FDCPA); *Bleich v. Revenue Maximization Group, Inc.*, 233 F. Supp. 2d 496, 500 (E.D.N.Y. 2002) ("[t]he

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> collection agency] because she allegedly failed to conduct herself with the reasonable care that society demands of all of us, and she cannot somehow transform this payment obligation arising out of an accident into a consumer transaction.

Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1371 (11th Cir. 1998). Further, Farmers is not a "debt collector" governed by the act. *See* 15 U.S.C. § 1692(a)(6) (defining a debt collector).

court . . . holds that the [consumer's] allegation that the debt sought to be collected is not owed, standing alone, cannot form a basis for a 'false and misleading practices' claim under the FDCPA"); *Ferguson v. Credit Mgmt. Control, Inc.*, 140 F. Supp. 2d 1293, 1303 (M.D. Fla. 2001) (collection notice urging the debtor to pay "this amount" was not actionable; "there is nothing in the letter designed to mislead or deceive even the least sophisticated consumer").

The Legislature expressly announced its intent to rely upon federal law that regulates deceptive and unfair practices.[5] Ms. Panag therefore cannot ignore the FDCPA and related case law.

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[5] The Legislature did not intend that the CPA be "construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest." RCW 19.86.920; *see also State v. Black*, 100 Wn.2d 793, 802-803, 676 P.2d 963 (1984) (Where conduct is "motivated by legitimate business reasons," the actions are not within the scope of RCW 19.86.020); *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 409, 759 P.2d 418 (1988). Limiting an insurer's ability to protect its subrogation interest by requiring that its claims be resolved through litigation creates an unprecedented burden on insurers that was not contemplated by the Legislature.

2. Courts Uniformly Permit Creditors to Demand Amounts Due Even Though Not Liquidated or Reduced to Judgment.

When Farmers paid its insured for the damages incurred, it became subrogated to its insured's claim against Ms. Panag, stepping into its insured's shoes to recover for Ms. Panag's tortious conduct. *See* CP 468; *First State Ins. Co. v. Kemper Nat'l Ins. Co.*, 94 Wn. App. 602, 610, 971 P.2d 953 (1999) ("Because the insurance company is standing in the shoes of the insured consumer, it logically flows that it may pursue the rights of its insured."). CCS notified Ms. Panag of the subrogation "amount due."[6] Insurers provide such notice as a matter of course. *See, e.g., Bierce v.*

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[6] Farmers referred its subrogation claims to CCS, according to the contract between Farmers and CCS, which states, in relevant part:

> CCS will attempt to recover subrogation claims of Farmers that Farmers at its sole discretion chooses to refer to CCS, and CCS shall utilize reasonable efforts consistent with industry standards, in a commercially reasonable manner and ***in compliance with all applicable laws***, to recover subrogation claims referred by Farmers from parties believed by Farmers to be responsible for those claims (hereinafter referred to as "Responsible Parties").

CP 496-97 ¶ 11(a) (emphasis added).

Grubbs, 84 Wn. App. 640, 642-43, 929 P.2d 1142 (1997) (Safeco wrote to its insured and driver of other vehicle "advising them of its subrogated interest and intent to seek reimbursement of the PIP advances [$14,200]"); *Hawthorne*, 140 F.3d at 1369 ("Liberty Mutual . . . provided Mac Adjustment [a collection agency] with subrogation rights to the $2,020.18 it claimed Hawthorne owed" and Mac Adjustment sent a letter demanding payment of the same).

Farmers' unliquidated subrogation claim against Ms. Panag has not been reduced to judgment. Although Ms. Panag complains that the attempts to collect on this claim constitute unfair or deceptive conduct, federal and state courts uniformly permit such collection efforts. *See, e.g., Bleich*, 233 F. Supp. 2d at 498 (collection letters referring to consumer's "failure to pay the amount due" and stating that "amount due is now seriously in arrears" were not actionable); *Kramsky v. Trans-Continental Credit & Collection Corp.*, 166 F. Supp. 2d 908, 909, 912 (S.D.N.Y. 2001) (collection agency's letter stated, "This past due statement reflects a balance due the above stated creditor. This account has been referred to collection and we must ask that you remit the balance shown in full

using the enclosed envelope;" holding that "if this letter were deemed to violate the FDCPA, no debt collector could ever demand payment of a lawful debt. This Court cannot and will not read the FDCPA to require so absurd a result").

Dwyer v. J.I. Kislak Mortgage Corp., 103 Wn. App. 542, 13 P.3d 240 (2000), relied upon by Ms. Panag, Panag's Opening Brief at 17-20, does not suggest otherwise. Ms. Panag's dispute with Farmers about her liability as an at-fault uninsured motorist is not analogous to *Dwyer*, where a mortgagee falsely represented charges secured by a deed of trust. 103 Wn. App. at 547. Farmers made no false statement.

The practice of sending demand letters is common, but Ms. Panag would have Farmers, and every other insurer seeking to recover its subrogation interest from an uninsured at-fault motorist, proceed directly to court. Such a result is unprecedented. *See, e.g., Fields v. Wilber Law Firm*, 383 F.3d 562, 564 (7th Cir. 2004) ("Essentially [plaintiff] asks us to endorse an approach that would require every debt collector under the FDCPA to go to court every time it sought to collect . . . . Plainly stated, the statute does not

require such an extraordinary result."). Because Farmers' efforts to collect its subrogation interest were permissible as a matter of law, the trial court erred by failing to dismiss Ms. Panag's CPA claim at the outset of the litigation.

B. The Trial Court Properly Dismissed Ms. Panag's CPA Claim as Matter of Law.

1. Ms. Panag's Claim Does Not Further the Purposes of the CPA.

The Washington State Legislature enacted the CPA to "protect the public and foster fair and honest competition." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 783, 719 P.2d 531 (1986) (quoting RCW 19.86.020). This was for the benefit of the consumer. *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 684, 911 P.2d 1301 (1996) ("The CPA was enacted to promote free competition in the marketplace for the ultimate benefit of the consumer.").

Ms. Panag seeks to take advantage of the CPA even though Farmers' collection effort did not arise out of a consumer transaction. *See Hawthorne*, 140 F.3d at 1371. Indeed, Farmers' relationship with Ms. Panag is adversarial; she is an uninsured

motorist who caused damage to a Farmers' insured. Thus, Ms. Panag is unlike private attorneys general who employ the CPA to protect ordinary consumers or businesses deprived of the benefit of their services. *See, e.g., Washington State Physicians Ins. Exch. v. Fisons*, 122 Wn.2d 299, 313, 858 P.2d 1054 (1993) (noting that while there is no requirement that the injured party be a consumer, with respect to drugs the physician "stands in the shoes of the ordinary customer" and is the "logical person to be the private attorney general" when the "drug company targets its marketing toward the physician, not toward the patient"); *First State Ins. Co.*, 94 Wn. App. at 610 ("an insurance company is a logical party to act as a private attorney general because it stands in the shoes of its premium-paying consumers who are affected by the underlying improper actions. Thus, allowing it to bring a CPA action furthers the purposes of the Act").

Ms. Panag also would have this Court ignore the role of the Insurance Commissioner in determining whether an insurer's practice is "unfair" or "deceptive." "[T]he legislature gave the Insurance Commissioner the rule-making authority under RCW

48.30.010(2) to define unfair or deceptive acts or practices in the business of insurance." *Leingang*, 131 Wn.2d at 151; *see* WAC 284-30-300 ("RCW 48.30.010 authorizes the commissioner to define methods of competition and acts and practices in the conduct of the business of insurance which are unfair or deceptive."); *see generally* WAC 284-300 *et seq; see also Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 430, 799 P.2d 235 (1990) ("In matters relating to the conduct of insurance business courts . . . should defer to the Legislature in the exercise of its police power to accomplish the regulation of unfair or deceptive economic practices.") (internal quotation and citation omitted). Ms. Panag has not shown and cannot show that the Insurance Commissioner has identified as "unfair" or "deceptive" efforts to collect unliquidated subrogation claims that have not been reduced to judgment.

In this regard, *Leingang* is instructive. In *Leingang*, a Farmers UIM, who also had medical coverage, was injured in an auto accident. 131 Wn.2d. at 137. The insured's health insurer, PCM, paid its insured's medical bills despite the insured's refusal to sign a subrogation agreement. *Id.* at 139. PCM then notified its

insured, Farmers, and the other driver's insurance carrier, that PCM was asserting a security interest and subrogation claim against any future settlement or judgment for reimbursement of the medical bills it paid on behalf of its insured based upon the policy language which excluded benefits payable under UIM coverage. *Id.* Leingang claimed, as Ms. Panag does, that PCM's assertion of its subrogation interest under the UIM exclusion violated the CPA. While the trial court agreed, the Court of Appeals reversed and granted summary judgment to PCM on the CPA claim. *Id.* at 136-37.

The Court of Appeals held:

> Mr. Leingang . . . argues that because the UIM exclusion was not affirmatively approved by the Insurance Commissioner, it was an unfair trade practice to include it in the insurance contract. . . . The . . . Insurance Commissioner . . . did not give notice. . . to the healthcare industry that it disapproved of such exclusions. . . . Absent any communication from the Insurance Commissioner that such an exclusion was disapproved, we cannot conclude that the Commissioner's silence . . . gives rise to an unfair or deceptive trade practice.

Id. at 153-54.

The Insurance Commissioner has not identified an insurer's effort to protect its subrogated interest by demanding reimbursement

of an "amount due" from an uninsured tortfeasor as unfair or deceptive conduct.[7] The trial court therefore should have dismissed Ms. Panag's CPA claim for failure to state a claim.

2. A CPA Claim Requires Cognizable Injury to Business or Property.

While failing to recognize that Farmers' efforts to collect on its subrogation claim were permissible as a matter of law, the trial court properly understood that no claim can exist without legally cognizable injury.[8] *See State v. Frank*, 112 Wn. App. 515, 523 n.13, 49 P.3d 954 (2002) ("injury is an essential element of . . . any claim") (citation and internal quotation omitted); *see also Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 61, 738 P.2d 665 (1987) (reversing a jury verdict for failure to prove injury and damages). The trial court correctly held that CPA claims are no different. *See*

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[7] An "obligation" or an "alleged obligation" is a debt. *See* 15 U.S.C. § 1692(a)(5); RCW 9.16.100(2)(a).

[8] Ms. Panag refers, repeatedly, to the "more than $1.5 million" she states Farmers and CCS "have illicitly obtained" from "members of the Washington public." Panag's Opening Brief at 1, 20, 23. Ms. Panag's speculation about the existence of other claims is irrelevant and unsupported. Further, no evidence in the record establishes that Farmers' subrogation practices were unlawful.

Hangman Ridge, 105 Wn.2d at 780 (to support a CPA claim a plaintiff must present evidence of (1) an unfair or deceptive act (2) committed in trade or commerce (3) that impacts the public interest and (4) ***injures the plaintiff's business or property,*** as well as (5) causation); *Sheldon v. Am. States Preferred Ins. Co.*, 123 Wn. App. 12, 17 n.11, 18, 95 P.3d 391 (2004) ("private CPA action requires showing that plaintiff was injured in his or her business or property;" "we cannot agree with [plaintiff's] contention that a violation causing no harm to policyholders [is actionable under the CPA]"), *review denied,* 153 Wn.2d 1030 (2005).[9]

Ms. Panag claimed the following injury after receipt of the CCS notices: (1) $.37 for a stamp to mail a letter to her attorney (whom she had previously retained to assist with matters related to the accident) enclosing the CCS notice, (2) an undocumented amount for parking at her attorney's office, and (3) the $9 charge she voluntarily incurred to obtain a copy of her credit report (the copy

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[9] Injury is also required to establish a right to injunctive relief. *See King County v. Port of Seattle*, 37 Wn.2d 338, 345, 223 P.2d 834 (1950) ("a party seeking an injunction must show . . . an actual and substantial injury").

proved neither Farmers nor CCS made any adverse credit report). CP 474-77; Panag's Opening Brief at 25-26, 28-29.

The trial court properly found that Ms. Panag's claim of investigation expenses did not constitute cognizable injury. *See* CP 411. In *State Farm Fire & Cas. Co. v. Huynh*, 92 Wn. App. 454, 962 P.2d 854 (1998), relied upon by Ms. Panag, State Farm suspected that a chiropractor was submitting reports about a staged auto accident and seeking reimbursement for false bills. *State Farm*, 92 Wn. App. at 457-58. Experts, interpreters, transcribers and attorneys for State Farm investigated the accident for six months and, ultimately, concluded that the accident had been staged. *Id.* at 468. State Farm's investigation costs substantiated the chiropractor's fraudulent conduct prior to filing suit. *Id.* at 457-58.

Here, Ms. Panag paid $9 to obtain a copy of her credit report, ***after*** she filed suit. CP 725. The report showed that no adverse credit information had been reported and that her credit was not injured. CP 474, 725. Receiving the collection notice did not cause any injury to Ms. Panag's business and did not cause her to relinquish any of her property or money. CP 711.

In any event, Ms. Panag's expenses represented the costs of bringing a claim, not damages or injury. *See Motorola, Inc. v. Fed. Express Corp.*, 308 F.3d 995, 1007 n.13 (9th Cir. 2002) ("We recognize that costs and attorney's fees are not 'damages'"). If the law were as Ms. Panag suggests, the requirement of "injury" and "damages" could be met automatically by ***any*** plaintiff who pays to park at an attorney's office, mails an attorney a letter, or makes a long-distance telephone call to inquire about her potential claim, on the theory that these out-of-pocket expenses were "caused" by defendant's allegedly wrongful conduct and therefore are recoverable damages. This simply is not the case.

St. Paul Fire & Marine Ins. Co. v. Updegrave, 33 Wn. App. 653, 656 P.2d 1130 (1983), on which Ms. Panag bases her claim that "[t]he consumer who is forced to defend an action which is premised upon unfair and deceptive acts will generally sustain damages for the purposes of the Consumer Protection Act," Panag's Brief at 32-33, was overruled by *Sign-O-Light Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 825 P.2d 714 (1992). There, the Court of Appeals held:

> In *St. Paul* . . . the court concluded that having to defend against a collection action and prosecute a counterclaim asserting a CPA violation was sufficient proof of injury under the CPA, though no injury to the claimants' business or property was ever alleged . . . . Given the *Hangman Ridge* injury requirement, that portion of *St. Paul's* holding is too broad. There must be some evidence, however slight, to show injury to the claimants' business or property. . . . Here, DeLaurenti's mere involvement in having to defend against Sign's collection action and having to prosecute a CPA counterclaim is insufficient to show injury to her business or property. . . . ***To hold otherwise would be to invite defendants in most, if not all routine collection actions to allege CPA violations as counterclaims.***

Sign-O-Light, 64 Wn. App. at 563-64 (emphasis added); *Demopolis v. Galvin*, 57 Wn. App. 47, 53 & n.5, 786 P.2d 804 (1990) (plaintiff's "alleged injury resulting from having had to bring [a CPA] suit to protect against Lenders' foreclosure action . . . is insufficient to satisfy the injury element of a private CPA claim;" "*St. Paul Fire & Marine Ins. Co. v. Updegrave* . . . [was] decided before the Supreme Court redefined the injury element in *Hangman Ridge*" (internal citations omitted)); *see also Wright v. Safeco Ins. Co.*, 124 Wn. App. 263, 281, 109 P.3d 1 (2004) ("In *Sign-O-Light* . . . the court rejected the argument that costs and fees incurred

in pursing a CPA claim established injury to business or property under *Hangman Ridge*. The court held that there must be some other evidence to establish injury to the claimant's property and attorney fees from prosecuting a CPA claim alone does not satisfy the injury requirement.") (citation omitted).

Ms. Panag's interpretation of "injury" also is not permitted by the American Rule, which prohibits shifting of fees and costs to favor the prevailing litigant:

> Respondent . . . argues that evidence concerning costs of litigation, including her attorney's fees, is equally pertinent to a determination of what amount will actually compensate the survivors for their monetary loss. In a sense this is, of course, true. ***But the argument that attorney's fees must be added to a plaintiff's recovery if the award is truly to make him whole is contrary to the generally applicable 'American Rule.'***

Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 495, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980) (emphasis added); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 271, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975) ("the 'American Rule' . . . is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs

in the manner suggested by respondents"); *Employers Reinsurance Corp. v. Mid-Continent Cas. Co.*, 358 F.3d 757, 767 (10th Cir. 2004) ("the expenses of litigation are never damages sued for in any case when the action is brought for the wrong itself . . . . They are not the natural and proximate consequence of the wrongful act. . . .") (internal quotation and citation omitted).

In her effort to have this Court overlook the deficiency in her claim, Ms. Panag mischaracterizes Farmers' position, arguing that Farmers advocates for some "minimum level" of injury. Panag's Opening Brief at 27. Farmers does not, however, base its challenge on the de minimis amount of Ms. Panag's postage and parking costs, but rather her claim that these litigation fees constitute injury under the CPA.

Because Ms. Panag's alleged "injury" consists entirely of the incidental costs of litigation, she cannot demonstrate the fourth essential element of the *Hangman Ridge* test.[10] "[A] complete

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[10] The cases that Ms. Panag relies upon to establish her injury demonstrate that injury, in fact, must be tangible and quantifiable. *See* Panag's Opening Brief at 26-28. *See Mason v. Mortgage*

failure of proof concerning an essential element of the nonmoving party's case" mandates the granting of summary judgment. *See Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The trial court's ruling that Ms. Panag failed to establish a CPA claim, as a matter of law, should be affirmed.

V. THE TRIAL COURT LACKED JURISDICTION, AS A MATTER OF LAW, WHEN IT ORDERED DEFENDANTS TO PROVIDE INFORMATION.

A Washington court loses jurisdiction when a matter has been finally resolved. *See, e.g., Mason v. Mason*, 40 Wn. App. 450, 457, 698 P.2d 1104 (1985). A matter is finally resolved when the rights of the parties in the action are finally determined and the matter is not subject to *de novo* review at a later hearing in the same action. *See, e.g., Wlasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 255, 884

America, Inc., 114 Wn.2d 842, 855, 792 P.2d 142 (1990) (loss of title to, and use of, real property); *Nordstrom v. Tampourlos*, 107 Wn.2d 735, 741, 733 P.2d 208 (1987) (loss of business reputation and goodwill); *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298-299, 38 P.3d 1024 (2002) (loss of use of funds used to pay for a two-week stay in a nursing home).

P.2d 13 (1994); *Bishop v. Lynch*, 8 Wn.2d 278, 282, 111 P.2d 996 (1941).

In this case, the rights of the parties were finally determined when the trial court granted summary judgment on Ms. Panag's CPA claim. CP 829-831. When Farmers, joined by CCS, brought the summary judgment motion, the only claim still in the action was Ms. Panag's CPA claim. Farmers and CCS had asserted no claims and the trial court had earlier dismissed Ms. Panag's unjust enrichment claim and her claims, if any, under the FDCPA. CP 238-39. With final resolution of the sole claim in the action, the trial court determined all of the rights of the parties and accordingly was divested of continuing jurisdiction. Lacking authority to take further action, the trial court erred in ordering Farmers and CCS to produce "a list of all persons who . . . were sent notices substantially similar to the November 10, 2003 collection notice sent to plaintiff . . . [Defendants] shall also include with this list all contact information it possesses for each person listed, and indicate with respect to each whether that person submitted any money or consideration of any sort to either CCS or Farmers." CP 831; *see, e.g., Foltz v. State*

Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1133 (9th Cir. 2003); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1426 (10th Cir. 1990).

The fact that Ms. Panag's complaint contained class action allegations does not change this outcome. *See Washington Educ. Ass'n v. Shelton Sch. Dist. No. 309*, 93 Wn.2d 783, 790, 613 P.2d 769 (1980) ("[A]n individual named as a party in a class action cannot assert the action merely because the class has a claim if he himself does not."); *see also Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1213 (10th Cir. 2006) (upholding dismissal of class action allegations based on trial court's correct ruling that putative class representative had failed to state a claim on his own behalf under the FDCPA); *Sample v. Aldi Inc.*, 61 F.3d 544, 551-52 (7th Cir. 1995) (class action allegations properly dismissed where district court granted summary judgment on plaintiff's individual claims), *disapproved on other grounds*, *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) (*per curiam*).

The critical point is that all of Ms. Panag's claims had been resolved ***before*** the court took action potentially affecting the proposed class (*i.e.*, ordering production of information regarding potential class members). This fact distinguishes this matter from the cases of *Jordan v. County of Los Angeles*, 669 F.2d 1311 (9th Cir. 1982) and *Int'l Bhd. of Elec. Workers, Local 1805 v. Westinghouse Elec. Corp.*, Civil Action No. N-76-543, 1979 WL 245 (D. Md. June 15, 1979), cited by Ms. Panag.[11] Panag's Opening Brief at 41-42, 46. The courts in those cases ruled that the class actions could proceed because in each case there was a plaintiff who still possessed at least one claim. *See Jordan*, 669 F.2d at 1317 (plaintiff's claim for injunctive relief survived settlement of claim for damages); *Int'l Bhd.*, 1979 WL 245, at *7-8 (acknowledging that individual plaintiff possessed cognizable claim for damages based on employer's vacation exhaustion policy).

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[11] Ms. Panag's extended discussion of an out-of-state unpublished opinion was improper. *See Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 471-73, 45 P.3d 594 (2002).

Similarly, because no class had been certified and Ms. Panag had not moved for class certification before the court granted Farmers' summary judgment motion, Ms. Panag's reliance on *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980), *Alexander v. Gino's, Inc.*, 621 F.2d 71 (3d Cir. 1980), *Cox v. Babcock & Wilcox Co.*, 471 F.2d 13 (4th Cir. 1972) and *Goodman v. Schlesinger*, 584 F.2d 1325 (4th Cir. 1978) is misplaced. At issue in those cases was whether a plaintiff could appeal a class certification denial entered either before the plaintiff's claims became moot or before the plaintiff lost his or her individual claims on the merits. The courts allowed the appeals to go forward if (1) a plaintiff had live individual claims when the district court decided the class certification issue, or at least had live claims when the motion for class certification was filed, *and* (2) appellate review might reverse an erroneous denial of class certification that, if correctly decided, would have prevented the action from becoming moot. *See Lusardi v. Xerox Corp.*, 975 F.2d 964, 973-80 (3d Cir. 1992). None of the cases, however, stands for the proposition that a court can continue to exercise jurisdiction over

a class certification motion filed by a named plaintiff lacking a live claim when the motion was filed. *See id; Cruz v. Farquharson*, 252 F.3d 530, 533-34 (1st Cir. 2001) (even if "a case is brought as a putative class action, it ordinarily must be dismissed as moot if no decision on class certification has occurred by the time that the individual claims of all named plaintiffs have been fully resolved"); *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135-36 (3d. Cir. 2000) ("If . . . putative class representative's individual claim becomes moot before he moves for class certification, then any subsequent motion must be denied and the entire action dismissed."); *Brunet v. City of Columbus*, 1 F.3d 390, 400 (6th Cir. 1993) (acknowledging "requirement that the proposed class representative have standing at the time of class certification"); *see also Grant v. Gilbert*, 324 F.3d 383, 390 (5th Cir. 2003) ("A plaintiff who never had standing to pursue the full claims of the class lacks a personal stake in litigating certification; therefore, the class claims are moot."); *cf. Sheehan v. Central Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 807-08, 123 P.3d 88 (2005) (affirming denial of class certification on mootness grounds, concluding trial court

committed no error by delaying decision on class certification until after disposing of substantive claims on summary judgment).

Nor does *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974) help Ms. Panag. Panag's Opening Brief at 47-48. That case and its progeny merely provide that the filing of a class action complaint tolls the statue of limitations for the claims of all absent class members until a motion for class certification is denied, a class action is decertified, or class claims are adjudicated on the merits. *See, e.g., Brewton v. City of Harvey*, 285 F. Supp. 2d 1121, 1126-27 (N.D. Ill. 2003). These cases have nothing to do with the power of a court to order parties to take action after the court has finally resolved all claims and been divested of jurisdiction.

VI. CONCLUSION

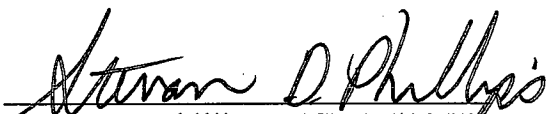
Ms. Panag's effort to create a cause of action under the CPA to prohibit Farmers from seeking to recover its subrogation claims from at-fault uninsured motorists fails. Farmers' conduct is permitted under state and federal law. Although the trial court erred in failing to dismiss Ms. Panag's CPA claim under CR 12(b)(6), it

properly found that Ms. Panag failed to establish injury as a matter of law and dismissed the claim on summary judgment. The dismissal, with prejudice, should be affirmed.

The trial court also erred by ordering Farmers and CCS to provide information after all rights of the parties had been resolved. This part of the court's ruling should be reversed.

RESPECTFULLY SUBMITTED this 16th day of February, 2006.

STOEL RIVES LLP



Stevan D. Phillips, WSBA #2257
Rita Latsinova, WSBA #24447
Deirdre L. Runnette, WSBA #28888

Attorneys for Appellant Farmers
Insurance Company of Washington

DECLARATION OF SERVICE

I, Juli Waldschmidt, hereby declare that at all times mentioned herein I was and now am a citizen of the United States of America and a resident of the State of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 600 University Street, Suite 3600, Seattle, Washington 98101.

On February 16, 2006, I caused to be filed with the Court of Appeals of the State of Washington, Division I, ***Farmers Insurance Company's Reply and Opposition to Respondent's Opening Brief.*** I also served copies of said document on the following parties as indicated below:

Matthew J. Ide Ide Law Offices 801 Second Avenue, Suite 1502 Seattle, WA 98104	***VIA MESSENGER/HAND DELIVERY*** [for plaintiff Rajvir Panag]
Murray T. S. Lewis 600 First Ave., Suite 409 Seattle, WA 98104	***VIA MESSENGER/HAND DELIVERY*** [for plaintiff Rajvir Panag]
William A. Pelandini Clarence C. Jones, Jr. Cozen O'Connor 1201 Third Avenue, Suite 5200 Seattle, WA 98101	***VIA MESSENGER/HAND DELIVERY*** [for Defendant Credit Control Services, Inc. d/b/a Credit Collection Services]

DATED: February 16, 2006 at Seattle, Washington.

Juli Waldschmidt